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To: All Health Carriers

**Subject: Nondiscrimination Requirements for Health Benefit Plans
Issued To Associations, Trusts, and Member Governed Groups**

Date: December 14, 2006

I. Purpose

The Office of the Insurance Commissioner (“OIC”) is issuing this Technical Assistance Advisory (“TAA”) to assist carriers in complying with RCW 48.43.035(1), RCW 48.43.025(3), and the Health Insurance Portability and Accountability Act (“HIPAA”) as they apply to health benefit plans issued to groups such as Associations, Trusts, and Member Governed Groups (hereafter collectively referred to as “Association(s)”). Some carriers are using health status-related factors in establishing rates for members who obtain coverage through an Association. These practices violate the nondiscrimination requirements of RCW 48.43.035(1) and HIPAA and the prohibition of RCW 48.43.025(3). The purpose of this TAA is to explain that carriers may not discriminate against employer-members of Associations and their employees with respect to coverage and premiums in policies purchased through Associations.

2. Use of Health Status-Related Factors in Rating an Association

When a carrier issues a master policy to an Association, the Association is the “group” and the employers and their employees are all members of the “group.” This principle was affirmed in *Regence BlueShield v. State of Washington*, Office of Insurance Commissioner, Thurston County Case No. 04-2-01761-8 based on the anti-discrimination provisions for group health benefit plans found in RCW 48.43.035(1).¹

The OIC is aware that some carriers continue to discriminate among members of Association groups through their rating practices by not providing the same benefits at the same rate to all members of the Association on a nondiscriminatory basis. For example, some carriers are using health status as a factor in setting rates for members of Associations. RCW 48.43.035(1) specifically prohibits discrimination in group health benefit plans based on health condition. In addition, RCW 48.43.025(1) prohibits a carrier’s rejecting, denying, excluding or limiting coverage based on a group member’s preexisting condition. The carrier may not “avoid the requirements of this section through the creation of a new rate classification or the modification of an existing rate classification.” RCW 48.43.025(3).

¹ In TAA 2005-05 issued on May 11, 2005, the OIC explained that Association health benefit plans are subject to large group requirements, which include nondiscriminatory treatment of all members of the group. Carriers were informed at that time that they could not discriminate in offering benefits to certain employer-members and their employees because of the size of the employer or for some other discriminatory reason prohibited by RCW 48.43.035(1).

HIPAA² also prohibits a carrier's use of health status-related factors³ in eligibility and premium determinations to discriminate between otherwise similarly situated enrollees in a group health plan.⁴

Consequently, carriers may not use health status-related information in offering coverage to or setting premiums for an employer or employee member of an Association.⁵ Health status-related factors may be considered only to determine whether the carrier will accept the Association as a group or in setting rates for the Association as a whole. Thus, while it is permissible to use health status-related information to determine the rate charged to the entire Association, it is not permissible to develop rates for the subset of members based in any way on the health status of the members and their enrollees.

3. Examples of Prohibited Practices

There are two situations in which the use of health status affects development of Association rates in a prohibited discriminatory manner:

- An employer- member joins an Association and the carrier requires its employees to submit health information. The carrier then develops a rate for that employer-member and its employees, which depends to some extent on the employee(s)' health information, which is higher than other members' rates for the same benefits.
- An existing employer-member's claims experience during the preceding period was higher because of its employee(s)' health status, and the carrier increases the rate for that employer-member and its employees to a rate higher than for other members for the same benefits.

4. Exemption from Small Group Community Rating

RCW 48.21.047, RCW 48.44.024 and RCW 48.46.068 provide an exemption from the community rating requirement otherwise applicable to all small groups. These statutes provide:

Employers purchasing health plans provided through associations or member governed groups formed specifically for the purpose of purchasing health care are not small employers and the plans are not subject to RCW 48.21.045(3).

These exemptions are available only in situations where a carrier issues a master policy to the Association. If the carrier contracts directly with Association members, however, then small employer members are not purchasing "through" the Association and the exemption does not apply.

² 42 U.S.C. Sec. 300gg-1; P.H.S.A. Sec. 2702.

³ PHSA Sec. 2702 identifies the following as health status-related factors: health status; medical condition; claims experience; receipt of health care; medical history; genetic information; evidence of insurability; participation in certain recreational activities; and disability.

⁴ A group health plan is defined as: "... a plan... of, or contributed to by, an employer... or employee organization to provide health care... to the employees, former employees, the employer, others associated or formerly associated with the employer in a business relationship, or their families." P.H.S.A. Sec. 2791(a)(1)

⁵ Carriers may use non-health status-related large group rating factors, such as age, family size, and geographic location in setting the premium for an Association member.

Prohibiting carriers from discriminating against small employer-members of Associations enables those members to realize the benefits of participating in a large group health plan. This result is consistent with the exemption from small group community rating for Association health plans that the legislature granted in RCW 48.21.047, 48.44.024, and 48.46.068.

5. Implementation

Carriers must review their Association plans for compliance with applicable laws as described in this TAA. This TAA will be effective for Association plans issued or renewed on or after January 1, 2008.

If you have any questions about this TAA, please contact Lichiou Lee, ASA, MAAA, Health Actuary, at 360-725-7128 or lichoul@oic.wa.gov.